Filed 6/4/03 P. v. Velasco CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE VELASCO,

Defendant and Appellant.

F040120

(Super. Ct. No. 74162)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. John P. Moran, Judge.

Katherine Hart, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Stan Cross and Daniel Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

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Jose Velasco was convicted of second degree murder in the death of Joey Pacheco and sentenced to a mandatory term of 15 years to life, enhanced by one year for use of a

dangerous or deadly weapon. (Pen. Code §§ 187, 12022, subd. (b)(1).)[1] He contends that his conviction was the result of ineffective assistance of counsel, prosecutorial misconduct or a combination thereof. We disagree and will affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

There was little dispute about what occurred on the day Velasco killed Pacheco. Velasco and his sister went to the house in which Pacheco's girlfriend lived to serve her with documents related to an eviction. Pacheco and Velasco argued. The argument quickly escalated into a fistfight, perhaps instigated by Pacheco. The fistfight escalated into a fight with weapons; Pacheco grabbed a tire iron and Velasco a baseball bat.

Velasco claimed at trial that he acted in self-defense. One factual dispute was who grabbed a weapon first. Velasco contended he retrieved an aluminum baseball bat to protect himself after Pacheco grabbed the tire iron. Witnesses testified that Velasco pulled out the bat first and Pacheco tried to protect himself with the tire iron.

Pacheco retreated to his vehicle when Velasco got the bat. Velasco began striking the vehicle near the driver's door. Pacheco and his girlfriend got out of the vehicle on the passenger's side. Pacheco threw the tire iron, striking Velasco on the arm and causing a wound requiring five stitches. The testimony differed as to whether this occurred before Velasco retrieved the bat or after Velasco began striking Pacheco's car.

When Pacheco exited the vehicle, he was on the opposite side of the vehicle from Velasco. Velasco went around the vehicle and hit the unarmed Pacheco with the bat at least two times and possibly as many as four. At least one of the blows, and perhaps two, landed on Pacheco's head, crushing his skull, and ultimately killing him.

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[1] All statutory references are to the Penal Code unless otherwise stated.

Velasco returned to his vehicle and left. He was arrested later that night when he went to a hospital seeking treatment for the wound on his arm. Velasco checked into the hospital using an assumed name.

Velasco gave three recorded statements to the police that were essentially consistent with the above facts. Velasco stated that he disposed of the bat while leaving the scene of the incident. The police recovered a bat believed to be the murder weapon from a boat located at his sister's house.

The information charged Velasco with one count of murder in the first degree and charged a single weapon enhancement. (§§ 187, 189, 12022, subd. (b)(1).) The prosecution argued that Velasco went to the house that day looking for trouble, and the killing was first degree murder because Velasco retrieved the bat with the intent to kill Pacheco. The prosecutor also claimed that Velasco acted with premeditation when he circled the vehicle and attacked the unarmed Pacheco.

Velasco argued at trial that he acted in self-defense but, even if the jury determined it was not self-defense, then he acted in the heat of passion and was guilty, at most, of voluntary manslaughter.

The jury returned a verdict of not guilty of first degree murder and guilty of the lesser included offense of second degree murder. It also found the enhancement true.

Velasco dismissed his retained attorney after the verdict, substituted new counsel, and moved for a new trial on the grounds that he received ineffective assistance of counsel at trial. Velasco also asserted the prosecutor was guilty of misconduct. The trial court denied the motion and imposed the mandatory sentence of 15 years to life, plus one year for the enhancement.

DISCUSSION

Velasco contends that he received ineffective assistance of counsel in seven distinct respects. Five of the grounds were asserted in the motion for a new trial rejected

by the trial court. He also claims the prosecutor twice committed misconduct as alleged in his motion for new trial.

"A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion. ' "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." ' [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 524; see also, *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1251-1252; *People v. Andrade* (2000) 79 Cal.App.4th 651, 659.)

I. Ineffective Assistance of Counsel

A defendant is entitled to a new trial if he received ineffective assistance of counsel at trial. (*People v. Lagunas* (1994) 8 Cal.4th 1030, 1036.) "Establishing a claim of ineffective assistance of counsel requires the defendant to demonstrate (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result. [Citations.] A 'reasonable probability' is one that is enough to undermine confidence in the outcome. [Citations.]

"Our review is deferential; we make every effort to avoid the distorting effects of hindsight and to evaluate counsel's conduct from counsel's perspective at the time. [Citation.] A court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance. [Citation.] Nevertheless, deference is not abdication. It cannot shield counsel's performance from meaningful scrutiny or automatically validate challenged acts and omissions. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541.)

"If the record contains an explanation for the challenged aspect of counsel's representation, the reviewing court must determine 'whether the explanation

demonstrates that counsel was reasonably competent and acting as a conscientious, diligent advocate.' [Citation.] On the other hand, if the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation …. [Citation.]" (*People v. Cudjo* (1993) 6 Cal.4th 585, 623.)

These principles guide us as we examine each asserted instance of misconduct.

A. Failure To Offer Original Statement Into Evidence

The investigating officer obtained a statement while Velasco was receiving treatment at the hospital. In this statement, Velasco made passing reference to a concern that Pacheco might be going for a gun when he went back to his vehicle and obtained the tire iron. After Velasco was released from the hospital, he was transported to the police station, informed of his constitutional rights (*Miranda v. Arizona* (1966) 384 U.S. 436 *(Miranda)*), and another statement was obtained. This statement was interrupted while the investigating officer determined Pacheco's condition. When the investigating officer returned, he informed Velasco that Pacheco would likely die and obtained additional information from Velasco.[2] Velasco did not suggest that he was concerned that Pacheco was going to retrieve a gun from his vehicle in either statement given at the police station.

The prosecutor introduced into evidence the two statements obtained at the police station. Neither party attempted to introduce the statement obtained at the hospital. Therefore, there was no evidence that Velasco ever thought Pacheco might be looking for a gun in his vehicle. Nonetheless, in closing, Velasco's attorney (hereafter trial counsel)

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[2] The parties refer to these as three separate statements. For the sake of convenience, we will do the same.

argued that the statements revealed that Velasco was concerned that Pacheco might have a gun. The prosecutor argued in rebuttal that Velasco did not mention his concern that Pacheco might retrieve a gun in either statement admitted into evidence and he invited the jury to review the transcripts. Trial counsel objected and, after a conference at the bench, the trial judge informed the jury that there was no evidence Velasco was concerned about a gun and the evidence was closed.

Velasco claims the failure to introduce the statement obtained at the hospital and then referring to the gun in closing argument was ineffective assistance of counsel. The People argue that the tape was inadmissible because it was hearsay, and thus counsel properly did not seek admission of the statement. The People also argue that even if the statement should have been introduced, there was no possible prejudice.

Trial counsel was ineffective for failing to introduce the statement only if it was admissible. The statement was hearsay and thus not admissible unless subject to an exception to the hearsay rule. (Evidence Code, § 1200, subds. (a) & (b).) Velasco asserts the statement was admissible because it related to his state of mind. Evidence Code section 1250 permits introduction of statements relating to the declarant's state of mind when offered to prove or explain the acts or conduct of the declarant. This section, however, is subject to Evidence Code section 1252, which provides that such statements are inadmissible when made under circumstances that indicate the statement is not trustworthy.

To determine whether a statement is trustworthy under Evidence Code section 1252 requires the court to apply a broad and deep acquaintance with the way in which humans conduct themselves under such circumstances to the peculiar facts of the case. (*People v. Edwards* (1991) 54 Cal.3d 787, 819-820.) "To be admissible under Evidence Code section 1252, statements must be made in a natural manner, and not under circumstances of suspicion, so that they carry the probability of trustworthiness. Such declarations are admissible only when they are ' "made at a time when there was no

motive to deceive." ' [Citations.]" (*Id*. at p. 820.) A defendant may not introduce hearsay evidence for the purpose of testifying while avoiding cross-examination. (*Ibid*.)

Normally, the trial court in the exercise of its discretion makes the determination of whether a statement was given under circumstances of trustworthiness. (*People v. Edwards, supra,* 54 Cal.3d at p. 820.) Since the statement was not offered into evidence, the trial court did not reach the question of trustworthiness. Therefore, we examine the issue in the first instance.

A review of the record confirms that the statement was given in circumstances that demonstrate it was not trustworthy. Velasco was involved in a fight in which he struck Pacheco at least once on the head with a baseball bat that caused Pacheco to collapse. We can infer Velasco knew that he had caused substantial injury. Velasco then fled the scene and, by his own admission, disposed of the baseball bat. He admitted his family suggested he flee the state. He checked into the hospital using an assumed name to avoid capture.

Each of these facts demonstrates Velasco knew he was facing arrest. The statement at the hospital was made under circumstances of suspicion when Velasco had a motive to fabricate. Therefore, the statements were not admissible pursuant to the state of mind exception to the hearsay rule.

Given the fact that the statement at the hospital was not admissible, and no effort was made to attempt to get the statement admitted, the only explanation for trial counsel to refer to the statement during closing argument is a mistaken belief that the comment about the gun was included in the statements admitted into evidence. This mistake hardly rises to the level of ineffective assistance of counsel. Velasco is guaranteed a fair trial, not a perfect trial. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1019; *People v. Osband* (1996) 13 Cal.4th 622, 702.)

Even if we were to find trial counsel's actions fell below that of a reasonable attorney, Velasco must establish that the error was prejudicial, i.e., it is reasonably likely

that he would have received a more favorable result in the absence of the deficient representation. (*People v. Dennis, supra,* 17 Cal.4th at p. 540.) Velasco argues that the reference to a gun was necessary to support a potentially meritorious defense, apparently the claim of self-defense. We disagree. If this statement had been admitted, or if counsel had not mistakenly referred to Velasco's assertion that he believed Pacheco might have had a gun, Velasco would not have obtained a more favorable outcome.

First, as mentioned above, the reference to a gun was not admissible.

Second, had the gun testimony been admitted, the claim of self-defense remained highly suspect. Velasco stated that he thought that when Pacheco returned to his vehicle he might emerge with a gun. Velasco used this excuse to justify the fact that he returned to his vehicle to get the baseball bat. It was undisputed, however, that Pacheco emerged from his vehicle with a tire iron. There was no evidence of a gun at the scene. Moreover, according to Velasco, Pacheco threw the tire iron at him. Velasco then began hitting Pacheco's vehicle. This conduct is inconsistent with a claimed fear of a firearm; a bat would provide no defense against a gun.

Third, as Velasco was hitting the vehicle, Pacheco emerged from the other side without a gun. Velasco then walked around the vehicle and attacked Pacheco with the bat. Again, if Velasco were concerned that Pacheco had a firearm, he would not have pursued him around the vehicle.

As the People point out, if Velasco was truly concerned about a gun, he would have mentioned it in the statements he gave at the police station and not simply one isolated time while at the hospital. The prosecution would have driven this omission home had Velasco successfully sought admission of the statement obtained at the hospital.

Finally, the reference by trial counsel to a belief that Pacheco might have had a gun did not hurt Velasco. The jury was instructed that argument of counsel was not

evidence and that it must decide the case on the facts it determines to be true. We assume the jury followed these instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 431.)

B. Miranda Waiver

Velasco next complains the statement at the hospital was obtained before the investigating officers advised him of his constitutional rights pursuant to *Miranda*. This statement, however, was never offered into evidence. Therefore, if a *Miranda* advisement was necessary, there was no need to suppress the statement because it was not used as evidence.

To overcome this glaring defect in this argument, Velasco suggests that he was "softened up" during the first interview; thus, when he was taken to the police station and given the *Miranda* advisement, he was more willing to waive his rights. It also appears that Velasco is arguing that although he was advised of his rights pursuant to *Miranda*, he never affirmatively waived these rights. He now claims that the failure of trial counsel to suppress the first or all of the statements resulted in ineffective assistance of counsel.

The issue when a defendant challenges the validity of his *Miranda* waiver is twofold. First, the waiver must be voluntary, i.e., it must be the result of free and voluntary choice, and not intimidation, coercion or deception. (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) Second, the waiver must occur after the defendant has a full understanding of the rights being abandoned and the consequences of that choice. (*Ibid*.) We look at the totality of the circumstances to determine whether the waiver was valid. (*Ibid*.)

1. Velasco Acted Voluntarily

Velasco contends that he was "softened-up" during the first interview and thus the officer's advisement of his rights was too late to be effective. Velasco does not cite any authority to support this proposition. Therefore, we deny the claim on this basis alone. (*People v. Crittenden* (1994) 9 Cal.4th 83, 153.)

Even if we consider the argument, we find it lacking in merit. "The litmus test of a valid waiver or confession is voluntariness. 'The relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.' [Citation.] No single event or word or phrase necessarily determines whether a statement was voluntary. The answer must be derived from the totality of the facts and circumstances of each case, keeping in mind the particular background, experience and conduct of the accused. [Citations.] The question is 'not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case.' [Citation.]" (*People v. Kelly* (1990) 51 Cal.3d 931, 950.)

> "Our decision in *People v. Hogan* (1982) 31 Cal.3d 815 … [overruled on other grounds in *People v. Cooper* (1992) Cal.3d 771, 835-386] explained the mode of appellate review when the voluntary character of incriminating statements is in issue. We said, 'This court must examine the uncontradicted facts surrounding the making of the statements to determine independently whether the prosecution met its burden and proved that the statements were voluntarily given without previous inducement, intimidation or threat. [Citations.]'
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> " 'The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were "such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." [Citation.]' (*People v. Hogan, supra*, 31 Cal.3d at p. 841.) In determining whether or not an accused's will was overborne, 'an examination must be made of "all the surrounding circumstances — both the characteristics of the accused and the details of the interrogation." [Citation.]' [Citation.]" (*People v. Thompson* (1990) 50 Cal.3d 134, 166.)

Softening up, or psychological coercion, generally refers to police tactics or conduct that are of a character to render a subsequently obtained waiver of constitutional rights involuntary. This issue was presented in *People v. Honeycutt* (1977) 20 Cal.3d 150. The defendant was convicted of first degree murder. After his arrest and transportation to the police station, he was interrogated by an officer with whom the

defendant had a 10-year history. Prior to advising the defendant of his constitutional rights, the officer engaged him in a 30-minute conversation about past events, former acquaintances and the victim. The officer stated his intention was to get the defendant to talk about the offense and that towards the end of the conversation he could tell the defendant was softening up. The defendant agreed to talk about the offense, waived his rights and confessed to the crime.

The Supreme Court held that defendant's waiver was not voluntary. (*People v. Honeycutt, supra,* 20 Cal.3d at p. 161.) "It must be remembered that the purpose of *Miranda* is to preclude police interrogation unless and until a suspect has voluntarily waived his rights or has his attorney present. When the waiver results from a clever softening up of a defendant through disparagement of the victim and ingratiating conversation, the subsequent decision to waive without a *Miranda* warning must be deemed to be involuntary for the same reason that an incriminating statement made under police interrogation without a *Miranda* warning is deemed to be involuntary." (*Id*. at pp. 160-161.)

The defendant in *Thompson* was the primary suspect in the murder of a 12-year-old boy. He was advised of his rights after he and his girlfriend were arrested. Defendant requested an attorney. Three days later he learned his girlfriend was sick. Defendant asked to speak to the investigating officer and inquired about getting his girlfriend out of jail. A conversation/interrogation ensued which lasted three hours and resulted in a confession.

During the interrogation the officer indicated that unless defendant told him what happened, he could not be sure that defendant's girlfriend was not involved. The officer also referred to the girlfriend's fragile psychological makeup and stated that incarceration could "push her over the edge." The conversation covered unrelated topics but always returned to the murder. The officer made false representations about evidence that

incriminated defendant and stated that without defendant's cooperation they would be forced to proceed with a first degree murder charge.

Defendant asserted that his confession was not voluntary and should have been suppressed. The Supreme Court rejected defendant's contention that the false evidentiary statements by the officers rendered the confession involuntary. (*People v. Thompson, supra,* 50 Cal.3d at pp. 166-167.)

The Supreme Court also rejected defendant's contention that the references to the girlfriend's fragile psychological condition and continued incarceration were improper. Although it found some of the statements problematic, the Supreme Court concluded that the detective's statements did not induce the confession because the defendant did not confess until almost two hours after the statements were made. (*People v. Thompson, supra,* 50 Cal.3d at pp. 168-169.)

The Supreme Court next rejected the defendant's claim that he was threatened with the death penalty. While acknowledging that statements made in the face of such threats were inadmissible, the Supreme Court concluded that the officer's statements in this case, which did not mention the death penalty, were statements of fact, not threats. (*People v. Thompson, supra,* 50 Cal.3d at pp. 169-170.) The Supreme Court concluded that when viewing the totality of the circumstances, the statement was voluntary and admissible. (*Id*. at p. 170.)

This issue also was addressed in *Kelly* where the defendant was convicted of capital murder of an 11-year-old boy. The defendant was transported to the police station after arrest and informed of his rights, which he waived. On appeal, defendant claimed that the combination of his low intelligence, psychological problems and police misconduct rendered his waiver involuntary. The misconduct consisted of references to the defendant's religious background, his mother's reaction to the murder, the feelings of the dead boy's mother, the feelings of the little girl who escaped just before the defendant shot the boy, and comments that the evidence conclusively established defendant was the

killer. The Supreme Court held that since defendant continued to deny involvement in the crime after these comments, they were not the motivating factor in the confession. (*People v. Kelly, supra,* 51 Cal.3d at pp. 952-953.)

The defendant also complained that a comment made by an officer who was photographing him was inappropriate. The officer commented that he could not understand how someone as strong as the defendant could have hurt a little boy and that there must be something inside of the defendant that caused him to act. The defendant agreed and confessed when the interrogation resumed. The Supreme Court rejected the contentions that this comment was an impermissible suggestion that the crimes were committed while defendant was mentally ill (distinguishing *Hogan*) and an impermissible attempt to soften up the defendant (distinguishing *Hogan* and *Honeycutt).* (*People v. Kelly, supra,* 51 Cal.3d at pp. 953-954.)

This case presents far less compelling circumstances than *Hogan*, *Honeycutt*, *Thompson* or *Kelly*. When the detective approached Velasco in the hospital, the only question was whether a crime had been committed. There is no evidence of police coercion, intimidation or deception. Instead, it appears that Velasco was a willing participant in the conversation and was anxious to tell his side of the story. There is simply no merit to this contention.

2. The Waiver was Effective

Velasco was given the constitutionally mandated advisement and he stated he understood his rights. At the police station, however, he never affirmatively waived those rights. Instead, the investigating officers commenced the interrogation and Velasco responded to the questions. Velasco contends the lack of affirmative waiver required suppression of the statements.

People v. Whitson (1998) 17 Cal.4th 229 resolves this issue. In *Whitson*, the defendant was the driver in a serious automobile accident in which two people died. The police questioned him three times at the hospital. On each occasion he was advised of his

constitutional rights pursuant to *Miranda*. On each occasion the defendant stated he understood his rights. Only on the third interview did the officers ask defendant if he was willing to talk to them with his rights in mind. On the other two occasions, questioning commenced after defendant stated he understood his rights. (*Id*. at pp. 237-240.)

Defendant argued on appeal that he did not validly waive his constitutional rights. (*People v. Whitson, supra,* 17 Cal.4th at p. 245.) The Supreme Court, after reviewing applicable United States Supreme Court and California precedent (*Id*. at pp. 245-248), held that the failure to obtain an express waiver of his rights did not render the statement inadmissible. (*Id.* at p. 250.) "Although the police officers did not obtain an *express* waiver of defendant's *Miranda* rights, decisions of the United States Supreme Court and of this court have held that such an express waiver is not required where a defendant's actions make clear that a waiver is intended. [Citations.]" (*Ibid*.)

As in *Whitson*, Velasco's actions in voluntarily answering the questions after stating that he understood his constitutional rights, without ever indicating he did not want to do so or that he wanted an attorney, were an effective waiver. His conduct leaves no doubt about his intent to waive his rights, and he has not presented any thoughtful analysis in this appeal that would lead to a different conclusion.

Since any motion to suppress the two statements admitted at trial would have been denied, trial counsel was not ineffective for failing to file a frivolous motion.

C. Testimony About Velasco's Veracity

During trial counsel's cross-examination of the investigating detective, the following colloquy ensued:

"[TRIAL COUNSEL]: Now, [Velasco] didn't lie to you, did he?

"[¶] … [¶]

"[LOPEZ]: I think he did.

"Q Well, let me ask you this: He told you he went over to serve eviction papers, right?

"A Yes.

"Q That's not a lie, is it?

"A I don't think so.

"Q He told you he went with his sister, didn't he?

"A Yes.

"Q That's not a lie?

"A No.

"Q He told you that he got into a fist fight with Pacheco, didn't he?

"A Yes.

"Q That wasn't a lie?

"A No.

The detective stated that he thought Velasco had lied about the number of times he struck Pacheco, the extent of the injuries he caused, the damage he caused to the vehicle, his intentions that day, and who first grabbed a weapon. When trial counsel attempted to inquire further into truthful portions of Velasco's statement, the trial court sustained the prosecutor's objection and instructed the jury, "I don't think we are going to pursue this any farther. This officer's opinion as to who is lying and who isn't, isn't irrelevant [*sic*]. The jury is going to make up their mind who is lying."

This issue need not detain us long. Trial counsel was not asked for an explanation for pursuing this line of questioning. Therefore, we may find ineffective assistance of counsel only if there could be no satisfactory explanation for this conduct. (*People v. Cudjo, supra,* 6 Cal.4th at p. 623.) Trial counsel's follow-up questions of the detective explain this course of conduct. He was hoping, and to some extent succeeded, to enhance Velasco's credibility by establishing that Velasco was in several ways truthful when he gave his statement to the police. This is a satisfactory explanation, even if appellate counsel would have chosen a different tactic.

Moreover, even if we thought trial counsel's questions could not be explained in a satisfactory manner, there is no prejudice. The trial court instructed the jury to disregard the detective's opinions about Velasco's veracity immediately after these questions were posed. At the conclusion of trial, the jury was instructed that it was to determine what facts have been proven (CALJIC No. 1.00), and that it was the sole judge of the believability of the witnesses (CALJIC No. 2.20). We assume the jury followed these instructions (*People v. Boyette, supra,* 29 Cal.4th at p. 431) and can discern no possible prejudice to Velasco from this line of questioning.

D. Suppression of Portions of Velasco's Statement

Velasco contends that one of the recorded statements played for the jury improperly referred to his criminal background. He claims that he received ineffective assistance of counsel because that portion of the statement was not suppressed.

In response to the investigating detective's inquiry about whether the reason Velasco considered running was because there was no reason for him to go back to the house, Velasco responded:

> No, that's not the reason. I mean -- I mean probably the truth -- I mean -- I -- I could probably you know -- I could probably win the case -- I mean he had a weapon as well. I mean he took out his weapon -- you know -- we had -- we both had weapons -- we both wanted to fight. You know maybe (inaudible) more serious than me. (Inaudible)
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> "LOPEZ: So you know a lot about this kinda stuff?
>
> "VELASCO: Yeah.
>
> "LOPEZ: And you learned that from your other friend that was involved in this kinda (inaudible)
>
> "VELASCO: No, I mean I -- I learned that -- I mean through all the times being in the system -- you know.
>
> "LOPEZ: Okay

"VELASCO: It wasn't like I jumped him or I -- I -- I -- I -- went over there -- you know to start problems -- you know I -- I went over there you know -- so my sister could serve the papers.

"LOPEZ: Okay. Well perhaps that might be the thing for us at this point because of your -- your pattern with him of problems that you've had before. It almost looks as if either you set this up or you planned on it and I can't tell which one and all the things that followed they're a little bit odd."

Velasco contends that this reference to his experience "in the system" should have been suppressed. Assuming that the statement should have been suppressed, an issue we do not decide, we do not see how this one sentence in 30 pages of transcript could possibly lead to a conclusion that it is reasonably probable that but for that statement he would have received a more favorable result.

The most incriminating fact in this case was not Velasco's vague involvement with the system, but that he crushed an unarmed man's skull with a baseball bat. Other incriminating factors included that he struck Pacheco more than once, fled the scene, considered leaving the state, and attempted to obtain medical treatment under an assumed name. This single reference is so insignificant that it is cannot have caused Velasco any prejudice. Without prejudice, there is no ineffective assistance of counsel.

The cases on which Velasco relies do not change our analysis. In *People v. Hines* (1964) 61 Cal.2d 164, overruled on other grounds in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774-775, footnote 40,[3] the Supreme Court held the trial court erroneously admitted portions of the defendant's taped confession that referred to specific crimes that he had committed in the past. This holding, however, was based on the rule of *People v. Hamilton* (1963) 60 Cal.2d 105, 129-131, overruled on other grounds in *People v.*

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[3] *People v. Murtishaw, supra,* 29 Cal.3d 733, was overruled on other grounds by statute (§ 190.3) as stated in *People v. Boyd* (1985) 38 Cal.3d 762, 772-773.

Daniels (1991) 52 Cal.3d 815, 864-866, and *People v. Morse* (1964) 60 Cal.2d 631, 642-649, that evidence of extrajudicial admissions are not admissible without independent proof that a crime had been committed. (*People v. Hines, supra,* 61 Cal.2d at p. 174.) There was no discussion about ineffective assistance of counsel or possible prejudice resulting from the admission. Since Velasco did not admit he committed any specific crime, this case is irrelevant.

In *People v. Guizar* (1986) 180 Cal.App.3d 487, a witness gave a recorded statement that included the witness's belief that the defendant had committed other murders. The tape was played to the jury for the purpose of establishing the witness's state of mind and explaining his initial reluctance to testify. The appellate court, relying on *Hines*, held that admission of these statements without independent corroborating evidence was error and prejudicial. Again, specific reference to other murders is far different than a vague reference to being involved in the system. *Guizar* does not assist Velasco any more than *Hines*.

E. The Baseball Bat

The prosecution introduced into evidence a baseball bat believed to be the murder weapon. The bat had paint on it and a substance that appeared to be blood. The bat was found inside a boat located at the home of Velasco's sister. Velasco did not object to admission of the bat even though he claimed that he threw the murder weapon out of the window of his vehicle,

At the time of trial, the prosecution had a report from the local crime lab indicating the paint on the bat was consistent with the paint on Pacheco's car. The paint residue, however, had been sent to another lab for additional testing with more sophisticated equipment.

Shortly after the trial ended, the investigating detective received a report on the further analysis of the paint that stated it did not come from Pacheco's car. The report

was mailed several days before the start of trial. There was no explanation why the report was not received until after the end of trial.

As the People concede, this information, which was available before trial, may be imputed to the prosecution and form the basis for a claim that the prosecution failed to comply with its discovery obligation. Velasco makes such an argument, which we will address in the next section. Here, Velasco asserts he received ineffective assistance of counsel because trial counsel failed to have the bat independently tested.

The premise behind this argument is faulty. It would make little sense to have the paint on the bat tested twice unless there was some reason to believe the first crime lab was not trustworthy. No such evidence appears in the record.

A more logical argument would be that Velasco received ineffective assistance of counsel because his attorney allowed trial to proceed, i.e., failed to ask for a continuance, before the test results were received. This argument, however, presents the type of tactical second-guessing that the United States and California Supreme Courts have warned against. (See, e.g., *Strickland v. Washington* (1984) 466 U.S. 668, 689; *People v. Dennis, supra,* 17 Cal.4th at p. 541.)

Trial counsel was faced with the admission that Velasco hit Pacheco with a bat, the bat was found in Velasco's sister's boat, and one crime lab had determined the paint on the bat was consistent with the paint from Pacheco's vehicle. There is no evidence that Velasco ever informed trial counsel that this bat was not the murder weapon.[4] Under these circumstances, we reject the claim that trial counsel should have asked for a continuance to run further tests on the bat.

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[4] Velasco submitted a declaration in support of his motion for a new trial revealing other privileged communications.

We also reject the claim that it is reasonably probable that Velasco would have received a better result had the actual murder weapon not been located. Again, Velasco admitted hitting Pacheco with the bat. Several witnesses testified that Velasco struck Pacheco with a bat. The absence of the bat would have resulted in arguments by the prosecution that the murder weapon could not be found because Velasco concealed it to hide his involvement in the crime.

It is true the prosecutor argued that Velasco could not be believed because the bat admitted into evidence was located in a boat at his sister's house when Velasco claimed he threw it out of his car. This attack on Velasco's credibility, however, was cumulative with Velasco's fleeing from the scene, disposing of the bat, consideration of fleeing the jurisdiction, and using an assumed name to obtain medical treatment.

The attack on Velasco's credibility also is less damaging in this case because the facts material to the judgment were essentially undisputed. Velasco admitted that Pacheco threw the tire iron at him *before he attacked* Pacheco, i.e., Velasco admitted Pacheco was unarmed when he began swinging at Pacheco's head with a deadly weapon. He swung so hard that he *crushed* Pacheco's skull. Velasco's response was not proportional to the threat presented by Pacheco. The location of the murder weapon, and the bearing that issue had on Velasco's credibility, is not significant in comparison.

F. The Impeachment of Arlene James[5]

Prior to the testimony of Arlene James, a witness called by the defense to bolster Velasco's account of the events, the prosecutor indicated an intent to impeach her

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5 This and the following argument were not grounds on which Velasco asked the trial court to grant a new trial. He raises them now as independent bases to establish ineffective assistance of counsel.

credibility with the facts surrounding two misdemeanor convictions (§§ 148.9, 594) involving moral turpitude and a felony conviction for petty theft with a prior (§ 666).

James testified essentially consistent with Velasco's recorded statement. On cross-examination James was asked whether she had a felony conviction for theft. James responded, "For drugs, possession." When questioned about a felony for petty theft with a prior, James responded, "No. Not that I am aware of. I have a conviction for that but I don't think it was a felony. I think it was dropped down."

On redirect, trial counsel brought out that James had some minor brushes with the law when she was younger, had been a law-abiding citizen since 1992, and had a responsible job for the last five years working with children. At the end of redirect, apparently in response to the prosecutor's efforts to find Ms. James's criminal record, trial counsel stated, "Your Honor, with respect to these convictions that counsel has been asking Mrs. James about, we'll stipulate to them so he doesn't have to dig them up. It was a misdemeanor conviction for petty theft which is what she said, as well as a drug possession case. So she was being honest. We'll stipulate to that." The prosecutor then stated he did not have any additional questions.

The trial court then instructed the jury, "Ladies and gentlemen, I want you to disregard all this testimony about this woman's prior criminal involvement. None of the matters that have been mentioned here are proper evidence going to her truthfulness."

Velasco now claims he received ineffective assistance of counsel because trial counsel failed to request a hearing outside the presence of the jury about the admissibility of James's prior convictions prior to her testifying. Velasco argues that trial counsel should have known that possession of a controlled substance does not involve moral turpitude and that petty theft with a prior may or may not involve moral turpitude, depending on how recent the conviction occurred and the surrounding facts.

This argument reflects a selective reading of the record. First, prior to trial and outside the presence of the jury, the prosecutor stated that he would not ask questions

about the drug possession charges since they did not involve moral turpitude, but the other convictions (§§ 148.9 [giving a false name to an officer], 594 [vandalism]) involved moral turpitude and were admissible. Therefore, trial counsel had no indication that the drug possession charge would be discussed.

Nor did the prosecutor bring up the drug possession charge. James did when she provided a nonresponsive answer to a question about the petty theft conviction. There was nothing trial counsel could have done to prevent James from providing this information to the jury. This is not ineffective assistance of counsel.

Velasco also claims that he received ineffective assistance of counsel when his attorney offered the above stipulation. We disagree. James already had informed the jury of the convictions. By offering the stipulation, trial counsel avoided any additional inquiry into James's prior convictions, including potential admission of court records reflecting the convictions, as well as inquiry into the vandalism and false identification incidents. This was a proper tactic that merits no criticism.

Even had trial counsel acted below the standard of a reasonably competent attorney, the trial court's instruction to the jury eliminated any possible prejudice from this line of questioning.

G. Trial Counsel's Previous Involvement with the Prosecutor

The prosecutor and trial counsel were not adversaries for the first time. The record reveals a degree of animosity between the two.[6] Velasco complains that this animosity resulted in ineffective assistance of counsel.

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[6] We deny as irrelevant Velasco's request that we take judicial notice that the prosecutor in this action also prosecuted trial counsel in a three-count complaint that included charges of extortion and concealing evidence. These facts were not brought out before the jury and the animosity between the two attorneys is evident from the record.

Velasco points to only two portions of the transcript to support his theory. The first occurred when trial counsel's investigator was testifying. The investigator was called because he had written a report stating Roy Updite, a defense witness, made certain statements. This report was submitted to the prosecution by trial counsel. After that report was submitted, the investigator reviewed the report with Updite and was informed by Updite the report was incorrect. Another meeting ensued between the investigator and Updite, but the investigator failed to prepare an amended report. Updite testified consistent with his amended statement. The prosecutor attempted to impeach the investigator and Updite by suggesting that the original statement was the truth and that Updite and/or the investigator had fabricated the second statement.

The investigator attempted to explain his failure to file an amended report by his inexperience and workload. He explained that trial counsel had recently hired him, this was his first investigator job, and he was very busy. The investigator testified in somewhat confusing fashion that, although he had handwritten notes from the second interview, he did not type a report. In an attempt to explain to the trial court the investigator's testimony, the following colloquy ensued:

> "[TRIAL COUNSEL]: I think he is saying that he never typed it up, he just wrote some notes concerning this. I mean it's real difficult for my investigator right now because as a result of the troubles that I had with the DA's office and the State Bar I am closing up my business in November, and we have moved it all to my house.
>
> "[PROSECUTOR]: This sounds like a play for sympathy, and it's not appropriate."

The trial court quickly returned to the issue at hand.

During direct examination of the investigator, trial counsel was arguing that a question was relevant. During his argument he stated:

> "Well, Your Honor, I don't -- here are notes on there which I am going to get to which reflect the fact that he reinterviewed the man, and during the reinterview wrote down that he threw the tire iron the second

time. And I know these guys and I had [Detective Mark] Lopez go with him to make sure that they didn't come in here this afternoon and accuse us of tampering with evidence, which I know a lot about. And he is the guy that prosecuted me." [7]

Later, trial counsel again brought up the working conditions:

"[TRIAL COUNSEL]: And we moved the office to my office?

"[INVESTIGATOR BALDERAS]: Yes, sir.

"Q And it's not real organized?

"A Not organized.

"Q We got seven puppies running around, two kids, and we are trying our best to get everything done before I am suspended by the State Bar?

"A Yes, sir."

Finally, during trial counsel's closing argument the following colloquy ensued:

"[TRIAL COUNSEL]: Now, I had one other trial with this man which you heard a little bit about today and I just before sitting down I want to tell you something to be wary of.

"[PROSCEUTOR]: Your Honor.

"THE COURT: What's that?

"[PROSECUTOR]: Counsel is talking about something that's completely irrelevant at this time.

"[TRIAL COUNSEL]: Can I finish and then you can --

"THE COURT: Yes.

"[PROSECUTOR]: He is talking about another trial he has had with me. There has actually been several, and he wants to talk about a specific

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[7] Later during direct examination trial counsel gratuitously stated he was acquitted in the prosecution.

> trial. And if he wants to talk about those facts, I'll talk about those facts, but it's not evidence in this case.
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> "[TRIAL COUNSEL]: I don't want to talk about those facts. I just want to tell you what he does so you'll be wary of it when he delivers his summation. It's a technique which lots of people in the DA's office use, and that's basically to distort my argument …."

Velasco argues that these exchanges demonstrated bad blood between the attorneys, which necessarily detracted from the presentation of the defense case. Velasco claims this lack of professionalism demonstrates trial counsel was more interested in salvaging his own reputation than in winning the case.

Velasco does not cite any authority to support his proposition that these exchanges deprived him of the effective assistance of counsel. His argument appears to be that the jury must have viewed him in a bad light because of his attorney's actions.

There is no support in the record for this proposition. Some of the exchanges appeared to be directed towards helping or rehabilitating the defense's investigator. It is true that trial counsel should not have intimated that he was about to have his license to practice suspended, nor should he have made a vague reference to the former prosecution. But these relatively innocuous comments were part of a hotly contested trial. Other exchanges between the attorneys established the existence of animosity that could have existed for a variety of reasons. It is unlikely that these particular comments had any effect on the jury.

It is not enough for Velasco to show that the alleged errors had a conceivable effect on the outcome; he must show that they actually had an adverse effect. (*Strickland v. Washington, supra,* 466 U.S. at p. 693.) Here, Velasco does nothing but speculate, and asks us to do the same. It is just as likely that trial counsel's actions evoked some sympathy from the jury, resulting in a second degree murder conviction, as it is likely that the jury was aggravated by trial counsel's conduct. More importantly, trial counsel's actions, while in some cases unprofessional, could have been the result of a tactical

decision to attempt to evoke sympathy for Velasco and portray the prosecutor as overzealous. In any event, the record does not support this claim.

II. Prosecutorial Misconduct

Velasco contends he was denied a fair trial, a violation of his right to due process, because the prosecutor committed misconduct. Velasco cites two instances that he argues constituted the misconduct.

The first instance occurred after trial counsel argued in closing that Velasco was afraid that Pacheco might pull a gun out of the car. In rebuttal, the prosecutor correctly pointed out to the jury that there was no evidence that Velasco was concerned about a gun. Velasco contends that this was misconduct because the prosecutor knew that Velasco expressed concern about a gun in his first recorded statement.

The second instance occurred when the prosecutor failed to provide before trial the report establishing that the red paint on the bat that the police recovered did not come from Pacheco's vehicle.

A. Closing Argument

The circumstances surrounding trial counsel's erroneous reference to Velasco's concern that Pacheco may have had a gun were discussed, infra, in section I.A. The prosecutor stated in rebuttal, "Defense counsel said that you will find that in these transcripts here, take them back and look, that the defendant said he was worried that Mr. Pacheco was going to get a gun. Did [trial counsel] say that a few minutes ago? Read them. You will never see it because it's not there. It's not there. It's just not there. Like his defense, it's not there."

Trial counsel then objected and a bench conference was held.[8] As counsel returned to their tables, trial counsel remarked, "I don't know why you hid this from the jury [prosecutor]." The trial court then informed the jury "there is nothing mentioned about a gun in the statements that were admitted into evidence. And the evidence is closed in this matter."

The prosecutor continued his rebuttal that Velasco gave two statements and did not mention a gun. "Did he think there was a gun? If he would have thought there was a gun he might have said something about it on [*sic*] the two interviews he gave. The only evidence of a gun in this case is when [Pacheco's girlfriend] heard the defendant yelling get the gun."

Citing *People v. Daggett* (1990) 225 Cal.App.3d 751, and *People v. Varona* (1983) 143 Cal.App.3d 566, Velasco contends the prosecutor's actions were misconduct because he knew the evidence existed but implied it did not. The People assert that *Daggett* and *Varona* are distinguishable and the prosecutor's statements were fair comment on the evidence.

In *Varona* both defendants were convicted of rape and false imprisonment, while one defendant also was convicted of forced oral copulation. The defendants claimed the victim was a prostitute who willingly performed the acts but became enraged when they did not have the funds to pay for her services. The trial court refused to admit evidence that the victim had previously pled guilty to prostitution and was on probation at the time of the offenses. The appellate court held that the trial court abused its discretion in

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8 Immediately before the bench conference, trial counsel said to the prosecutor, "Why don't you calm down little man?" As we indicated, these lawyers did not like each other.

denying admission of the proffered under Evidence Code section 782. (*People v. Varona, supra,* 143 Cal.App.3d at pp. 569-570.)

The appellate court also held that the prosecutor committed misconduct when he argued that there was no evidence that the victim was a prostitute. "We agree that, in a proper case, a prosecutor may argue to a jury that a defendant has not brought forth evidence to corroborate an essential part of his defensive story. But we know of no case where such argument is permissible except where a defendant might reasonably be expected to produce such corroboration. Here the prosecutor not only argued the 'lack' of evidence where the defense was ready and willing to produce it, but he compounded that tactic by actually arguing that the woman was not a prostitute although he had seen the official records and knew that he was arguing a falsehood. The whole argument went beyond the bounds of any acceptable conduct." (*People v. Varona, supra,* 143 Cal.App.3d at p. 570.)

In *Daggett*, Daryl was charged with molesting two other youths. After being charged, he accused the defendant, his stepfather, of molesting him on three occasions. Defendant moved pursuant to Evidence Code section 782 to admit evidence of the pending charges against Daryl and the fact that two older children had previously molested Daryl. The trial court allowed the defense to admit evidence of the pending charges but denied the request about previous molestation.

The prosecutor argued in closing that if the pending charges against Daryl were true, they were the result of behavior that Daryl learned as a result of being molested by the defendant. The trial court initially overruled the defendant's timely objection. The defendant objected again and, after a conference in chambers, the trial court struck that portion of the prosecutors closing argument and instructed the jury not to consider it.

The appellate court held the trial court erred when it refused to hold a hearing on defendant's request to admit evidence of Daryl's prior molestation. (*People v. Daggett, supra,* 225 Cal.App.3d at p. 757.) "The error was compounded when the prosecutor

argued to the jurors that if they believed Daryl molested other children, he must have learned that behavior from being molested by Daggett. This is the type of argument the excluded evidence was intended to refute. [¶] The prosecution may argue all reasonable inferences from the record, and has a broad range within which to argue the facts and the law. [Citation.] The prosecutor, however, may not mislead the jury. The prosecutor asked the jurors to draw an inference that they might not have drawn if they had heard the evidence the judge had excluded. He, therefore, unfairly took advantage of the judge's ruling. Vigorous advocacy is admirable, but when it turns into a zeal to convict at all costs, it perverts rather than promotes justice." (*Id*. at pp. 757-758.)

In both *Varona* and *Daggett* the prosecution took advantage of the absence of evidence in making their arguments. In both cases, the evidence was absent because the trial court sustained the prosecution's objection to the evidence. We agree such conduct is prosecutorial misconduct.

In this case, however, the prosecution merely reacted to trial counsel's argument that Velasco was compelled by the belief there was a gun when there was no evidence admitted to support such a claim. The jury was required to decide the case on the evidence admitted during the trial. The prosecutor pointed out that a portion of Velasco's defense was not supported by admissible evidence. As the *Varona* court pointed out, these actions are not misconduct.

B. The Bat

Finally, Velasco resumes his attack on the failure to obtain the second report on the paint sample on the bat. The facts were set forth in section I.D. This time Velasco contends that the failure to provide him the report prior to trial was prosecutorial misconduct, denied him a fair trial (*Brady v. Maryland* (1963) 373 U.S. 83), and violated the discovery obligations in section 1054.1. Velasco claims that the report established the bat was not the murder weapon and thus was exculpatory evidence that the prosecution was required to disclose.

First, this report did not establish that the bat admitted into evidence was not the murder weapon. It merely established that the paint on the bat did not come from Pacheco's car.[9] The bat could have been the murder weapon and the absence of any objection to introduction of the bat at trial indicates that it may have been the murder weapon.

Second, even if we assume the report contained exculpatory evidence and the prosecution was required to disclose it, and if we assume that the knowledge of the lab is imputed to the prosecution (*Kyles v. Whitley* (1995) 514 U.S. 419, 437; *In re Brown* (1998) 17 Cal.4th 873, 878-879), this argument still fails. "[S]uppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. Consistent with 'our overriding concern with the justice of the finding of guilt,' [citation] a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." (*United States v. Bagley* (1985) 473 U.S. 667, 678.)

> "The current standard of review for *Brady* materiality was first articulated in *Bagley, supra,* 473 U.S. 667, although the United States Supreme Court began developing it in earlier decisions. [Citations.] Recently in *Whitley, supra,* 514 U.S. 419, the court reemphasized four aspects articulated in *Bagley* critical to proper analysis of *Brady* error. First, '[a]lthough the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). [Citations.] *Bagley's* touchstone of materiality is a "reasonable probability"

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9 Velasco asserts in his brief that this report established that the bat did not have blood but merely metallic paint. This is incorrect. The testimony indicated that the bat had what appeared to be blood on it and also paint smudges. This report related only to the paint smudges.

> of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.' [Citation.]
>
> "Second, 'it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' [Citation.]
>
> "Third, 'once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review.' [Citation.] The one subsumes the other. [Citation.]
>
> "Fourth, while the tendency and force of undisclosed evidence is evaluated item by item, its cumulative effect for purposes of materiality must be considered collectively. [Citations.]" (*In re Brown, supra,* 17 Cal.4th at pp. 886-887.)

The issue is whether the nondisclosed evidence undermines our confidence in the outcome, or there is a reasonable probability of a different result, or the favorable evidence could shed a whole new light on the case so as to undermine our confidence in the verdict. The answer is no, regardless of how the test is formulated.

We explained in section I.E. that even if trial counsel's representation fell below the required standard, Velasco could not establish ineffective assistance of counsel because he could not establish prejudice as a result of the failure to discover that the paint on the bat did not come from Pacheco's vehicle. For the same reasons, he cannot establish that this report is material, i.e., our confidence in the outcome of this case is not undermined. Velasco admitted he struck Pacheco in the head with a bat. Whatever minor advantage the prosecutor achieved by having this bat admitted into evidence, as

opposed to having only Velasco's admission, did not have any significant effect on the verdict.

While the statutory duty to disclose found in section 1054.1 is separate and independent of the constitutional obligation of disclosure (*People v. Bohannon* (2000) 82 Cal.App.4th 798, 804), the only method of enforcing a violation of this section is through the procedures found in section 1054.5. While section 1054.5 provides various sanctions for a violation of section 1054.1, these are available only prior to the close of evidence and while the trial court has jurisdiction over the case. (*Id*. at p. 805.) After trial, the defendant is limited to the relief available under the constitution, i.e., the relief available under *Brady* and its progeny. (*Ibid*.) As demonstrated above, no such relief is available in this case.

Finally, any claim based on prosecutorial misconduct is similarly fruitless. " 'In general, a prosecutor commits misconduct by the use of deceptive or reprehensible methods to persuade either the court or the jury.' [Citation.] [¶] ' "It is, of course, the general rule that a defendant cannot complain on appeal of misconduct by a prosecutor at trial unless in a timely fashion he made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." [Citation.] There are, indeed, certain exceptions. For example, the rule is inapplicable when the harm could not have been cured. [Citation.]' " (*People v. Rowland* (1992) 4 Cal.4th 238, 274.)

The prosecutor in this case did not use reprehensible methods to try and persuade either the court or the jury. Theoretically, there was a failure to disclose evidence, but this claim is adequately addressed under the rubric of *Brady*. It is not prosecutorial misconduct.

III. Cumulative Error

Velasco asserts that even if any single error does not require reversal, the cumulative effect of the numerous errors do. We have not found any error; so, we necessarily reject this claim. (*People v. Bolin* (1998) 18 Cal.4th 297, 335.)

DISPOSITION

The judgment is affirmed.

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CORNELL, J.

WE CONCUR:

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DIBIASO, Acting P.J.

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BUCKLEY, J.